MOTION FILED
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NO. 88-1395

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE MUNICIPAL COURT OF THE SOUTHEAST JUDICIAL DISTRICT, COUNTY OF LOS ANGELES; PORTER DE DUBOVAY; and RUSSELL L. SCHOOLING,

Petitioners,

VS.

ALVA GUTIERREZ,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE

Movants U.S.ENGLISH Foundation, Inc., and U.S.ENGLISH Legislative Task Force, Inc., District of Columbia non-profit corporations, hereby respectfully move for leave to file the attached brief *amici curiae* in this case. Counsel of record for the petitioner has consented to the filing of this brief. Counsel for respondent refused consent to file this brief.

The interest of movants in this case arises from the fact that they were the principal proponents of an initiative which enacted Article III, § 6 of the California constitution; this portion of the California constitution is partially at issue in this case. The decision of the lower court panel in this case described this provision as "primarily . . . symbolic", effectively negating movants' efforts.

The issue of the effect of Art. III, § 6 was briefed in the lower court (and appears in the lower court panel decision), yet the petition for a writ of certiorari does not mention the provision. Nor does Judge Kozinski's otherwise comprehensive dissent from the Ninth Circuit's denial of review *en banc* mention Art. III, § 6. Movants believe that their discussion of this and the general issues in this case would aid the Court in determining whether to grant the petition.

Respectfully submitted,

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vs.

ALVA GUTIERREZ,

Respondent.

PROPOSED BRIEF AMICI CURIAE ON BEHALF OF U.S.ENGLISH FOUNDATION, INC. AND U.S.ENGLISH LEGISLATIVE TASK FORCE, INC.

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QUESTION PRESENTED

Because Amici Curiae are not certain whether the following question is clearly included within the questions presented in the petition for a writ of certiorari, Amici respectfully suggest that Question 3 presented in this case fairly includes the following question:

Whether Article III, section 6 of the California constitution (designating English the official language, establishing ancillary obligations of and restrictions on government, and creating standing to enforce the restrictions) is merely symbolic or whether this provision affects work rules governing language usage in governmental workplaces?

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INTEREST OF AMICI CURIAE

Amici U.S.ENGLISH Foundation, Inc. and U.S.ENGLISH Legislative Task Force, Inc., District of Columbia non-profit corporations (hereinafter U.S.ENGLISH), are the principal proponents of initiatives and statutes designating English the official language of various states. *See, e.g.*, Zall/Jimenez, "Official Use of English: Yes/No", 74 A.B.A. J. 34-5 (December 1, 1988)(hereinafter Zall/Jimenez); Montero v. Meyer, No. 88-6376, and *Delgado v. Smith*, No. 88-1327, and *In re Delgado*, No. 88-1329. U.S.ENGLISH believes that "official language statutes ensure the preservation of English as our common language . . . without infringing individuals' rights." Zall/Jimenez, *supra*, at 34.

U.S.ENGLISH, through its California political committee, was the proponent of the 1986 initiative which enacted Article III, § 6 of the California constitution.[1] Argument in Favor of Proposition 63, California Ballot Pamphlet 46 (Nov. 4, 1986), *quoted* in part in App. at A25.

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1 Art. III, § 6 is quoted in relevant part in Appendix to Petition for a Writ of Certiorari (hereinafter App.) at A23-4. The constitutional provision contains a preamble (Art. III, § 6(a)), a declaration that English is the official language of California (Art. III, § 6(b)), obligations of and restrictions on government (Art. III, § 6(c)), and a statutory standing clause for private enforcement (Art. III, § 6(d)).

As proponent of an initiative in California's elaborate procedure for amending its constitution by initiative, U.S.ENGLISH had numerous opportunities to make legislative history explaining its intent and its interpretation of the initiative.[2] *Id.*; Statement of Stanley Diamond on Behalf of the California English Campaign, Proponent of Proposition 63, English as the Official Language, September 29, 1986, and October 1, 1986; Statements of S.I. Hayakawa, Stanley Diamond, and Barnaby Zall, Sen. Cmte on Elections and Assembly Task Force on Proposition 63, Joint Interim Hearing on Proposition 63, English as the Official State Language, Pub. 091-J, October 1, 1986, 126-141. Under California law, voter materials are recognized as the equivalent of legislative history. *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal.3d 209, 245-6, 149 Cal.Rptr. 239, 257-58, 583 P.2d 1281, 1300 (1978), *overruled on other grounds sub nom. Los Angeles County Transportation Comm'n v. Richmond*, 31 Cal.3d 197, 182 Cal.Rptr. 324, 643 P.2d 941 (1982).

U.S.ENGLISH participated as amicus curiae in the court below after a request by the panel for briefing on the effect of Proposition 63. Brief Amicus Curiae of U.S.ENGLISH. U.S.ENGLISH did not adopt, in its amicus brief, a position on the preliminary injunction which is at issue in this case.

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2 Views of proponents of initiative measures are given special weight under California law. *In re Lance W.*, 37 Cal.3d 873, 879, 694 P.2d 744, 754, 210 Cal.Rptr. 631, 641 (1985).

Nevertheless, as discussed more fully *infra*, the lower court panel discussed and dismissed Art. III, § 6 as "primarily a symbolic statement." App. at A24. The panel's opinion[3] has been cited in California and elsewhere for the principle that Art. III, § 6 is largely symbolic. *See, e.g.*, Dean, Confidential Memorandum to Mayor and Council of Tucson, Arizona, on Proposition 106, November 29, 1988, at 9 (citing the lower court opinion that the provision is "a symbolic statement").

Amici are adversely affected by the lower court's decision and therefore have an interest in supporting the petition for writ of certiorari in this case.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Other Decisions.

Rules governing choice of language on the job are increasingly a topic of controversy nationwide. White House Conference on Small Business, A Report to the President of the United States, November 1986, P. 34; *Jurado v. Eleven-Fifty Corp.* (hereinafter *Jurado*), 813 F.2d 1406 (9th Cir. 1987)(requirement that employee speak English on the job not discriminatory); *Garcia v. Gloor* (hereinafter *Gloor*), 618 F.2d 264 (5th Cir. 1980), *cert. den.*, 449 U.S. 1113 (1981)(same); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)(hiring rule that truck drivers speak English does

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3 Judge Kozinski's dissent did not discuss the official language statute question.

not violate § 1981); *Garcia v. St. Luke's Medical Center*, 660 F.2d 1217 (7th Cir. 1981)(hiring practices requiring English not discriminatory; *Stephen v. Sheraton Resort*, 669 F.Supp. 1573 (S.D.Fla. 1987)(Haitian reinstated because of racial discrimination against blacks despite evidence of poor English skills that caused job-related losses to employer); *Flores v. Hartford Police*, 25 F.E.P. 180 (D.Conn. 1981)(English language rule at police academy upheld); *Mejia v. N.Y. Sheraton Hotel*, 459 F.Supp. 375, 377 (S.D.N.Y. 1978)(English proficiency was bona fide occupational qualification for hotel front desk personnel); *Saucedo v. Brothers Well Service*, 464 F.Supp. 919, 921-2 (S.D.Tex. 1969)(English on the job rule would cause disparate impact but could be upheld for digging a well).

In this case, black and Latino co-workers requested the issuance of a language rule as an aid to workplace harmony. App. at A60-62. The lower court dismissed this rationale as simply bigotry by blacks, App. at A21, n. 15, and suggested, in Judge Kozinski's words, a "let them eat cake" solution of replacing black employees with Spanish-speaking ones. App. at A67.

Unfortunately, these language-related conflicts are increasingly common. Guevarra, "UC Workers Protest 'English-Only' Rule," San Francisco Chronicle, June 30, 1988, P. A8, (citing the lower court opinion, reporting complaint filed with EEOC concerning ability of department heads in medical center to require English-only rules in some cases); McMahon, "Proposed 'English-only' Policy Withdrawn," Merced Sun-Star, June 25, 1988, P. 1, Cols. 1-5 (reporting conflicts in a county health department strikingly similar to those described in Judge Kozinski's dissent); Warren, "Bottling Company Sued Over Language Dismissal," Arizona Daily Star, June 16, 1988, P. 1B, Col. 1-2 (reporting a lawsuit over dismissal because the

employee didn't know enough English to adapt to new equipment in the workplace).

Gloor, supra, appears to have been a case of first impression. Petition for Writ of Certiorari in No. 80-810, P. 12. In *Gloor*, the Fifth Circuit held that workplace rules requiring bilingual sales employees to speak English on the job do not discriminate against bilingual employees. The rule in *Gloor* is substantively identical to that in this case; the ruling of the Fifth Circuit was exactly the opposite of that of the court below.

Similarly, the Ninth Circuit's own decision in *Jurado* found that a workplace rule requiring a bilingual employee to speak English on the job was not discriminatory. The rule in *Jurado* prohibited the employee from speaking any Spanish while performing his duties. The Court below distinguishes *Jurado* as involving a business necessity, but Judge Kozinski's dissent from the denial of *en banc* review demonstrates that *Jurado*, an appeal from a summary judgment, involved no such analysis. App. at A57-58.

The decision below extends the law involving language choice by bilingual employees to such lengths that its practical effect is to forbid employers from promulgating any workplace rules concerning choice of language even by fully bilingual employees. Under the lower court's rationale, as pointed out by Judge Kozinski, no employer could promulgate a workplace rule to ameliorate language conflicts in the workplace. App. at A67, n. 14.

The Court should review and reverse the lower court panel's opinion to insure consistency and predictability for employers who seek to know whether they can promulgate reasonable rules related to language. Absent this Court's review, the conflict this case poses with all other relevant decisions will confuse employers;

employers will believe themselves vulnerable to suit for discrimination and will withdraw even those language rules necessary for health and safety. *Contrast, e.g.*, Guevarra, *supra* (citing lower court panel opinion, reporting threatened suit against language rules in hospitals) *with Garcia v. St. Luke's Medical Center*, *supra* (hospital may consider English fluency in hiring).

II. The Decision Below, By Dismissing California's Constitution, Ignores Logic, California Law, and Important Elements of Federalism.

Proposition 63, which enacted Art. III, § 6 of the California Constitution (hereinafter the California English Language Amendment, or ELA), passed during the lower court panel's deliberations on this case. The panel requested supplemental briefing on: "What, if any, effect does the recent adoption by the State of California of an 'English Only' [sic] initiative have upon the issues in this case?" Order of Feb. 2, 1987, P. 2. Both parties and two amici filed responses to the panel's inquiry.

The California ELA is one of 17 state constitutional provisions and statutes which designate English as the official language.[4] The California ELA, reprinted in relevant part in App. at A23, FN16, has four parts: a

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4 Arizona (1988), Arkansas (1987), California (1986), Colorado (1988), Florida (1988), Georgia (1986), Hawaii (1978), Illinois (1969), Indiana (1984), Kentucky (1984), Mississippi (1987), Nebraska (1920), North Carolina (1987), North Dakota (1987), South Carolina (1987), Tennessee (1984), and Virginia (1986).

preamble stating the purpose and nondiscriminatory intent of the provision (Art. III, § 6(a)), a declaration that English is the official language of California (Art. III, § 6(b)), obligations of and restrictions on government (Art. III, § 6(c)), and a statutory standing clause for private enforcement (Art. III, § 6(d)[5]). The California Attorney General has opined that the California ELA requires all government publications to be in English to be effective. Van de Kamp, Opinion Letter to Stanley Diamond, May 20, 1987, P. 2.

The lower court panel, on the other hand, declared that: "While section 6 may conceivably have some concrete application to official government communications, if and when the measure is appropriately implemented by the state legislature, it appears otherwise to be primarily a symbolic statement concerning the importance of preserving, protecting, and strengthening the English Language. . . . cf. *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575, 577 (7th Cir. 1973)." App. at A24.

The lower court panel was correct in requesting briefing on the effect of the California constitution on this case. It was also correct to analyze the California constitution and its legislative history to determine the effect of the amendment on employment practices by governments in California. It might have been correct if it had determined, after appropriate review, that federal law superseded the California constitution on this issue.

It was not correct in dismissing the California constitution as merely symbolic. This casual dismissal of an

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5 As far as Amici are aware, no suit has yet been brought under Art. III, § 6(d).

initiative passed by the people of California ignores logic, California law, and important concepts of federalism.

A. Logic Suggests the California ELA Would Have An Effect.

Both proponents and opponents of the measure assumed that the California ELA would have an effect. *See, e.g.*, California Ballot Argument Pamphlet, General Election, November 4, 1986, pp. 46-47, *quoted* in part by the lower court panel in App. at A25.

A symbolic statement would not require a government to "take all steps necessary" to achieve an end, Art. III, § 6(c), nor would a symbolic statement declare that a government "shall make no law" on a particular subject. *Id.* Nor would a symbolic statement require a statutory standing clause. Art. III, § 6(d).

B. California Law Suggests the California ELA Would Have An Effect.

By dismissing Art. III, § 6 as "symbolic", the lower court panel ignores the fact that California law does not allow symbolic initiatives. *Eu v. AFL-CIO*, 36 Cal.3d 687, 686 P.2d 609, 613, 206 Cal.Rptr. 89, 93 (1984). Amici, authors of Art. III, § 6, were well aware of *Eu* and wrote portions of the initiative to meet the tests for effectiveness and enforcement in that case.

In California, as elsewhere, voters who amend their constitution by initiative are presumed to intend to work a change and "[a] cardinal rule of construction is that . . . a construction making some words surplusage is to be avoided." *People v. Gilbert*, 1 Cal.3d 475, 462 P.2d 580, 584, 82 Cal. Rptr. 724, 728 (1969). Indeed, the voters are expected to know the consequences of their actions and intend that their actions be effective.

In re Kay, 1 Cal.3d 930, 942, 484 P.2d 142, 83 Cal.Rptr. 686 (1970).

C. Important Concepts of Federalism Suggest That the California ELA Should be Considered Effective.

Fundamental principles of federalism should require a searching and careful analysis before dismissing a state constitutional provision on ground of violating federal law. *Teague v. Lane*, ___ U.S. ___, 109 S.Ct. 1060 (1989)(habeas corpus review); *Engle v. Isaac*, 456 U.S. 107, 128, n. 33 (1982)(same). By so dismissing the California ELA, the lower court panel has ignored the will of the people of California and relegated a portion of California's organic law to surplusage.

Therefore, amici respectfully request the Court to review and reverse that portion of the lower court panel's decision dismissing Art. III, § 6 of the California constitution as "symbolism."

CONCLUSION

For these reasons, the writ of certiorari should be granted.

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